SEP 12 1955
HAROLD B. WILLEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

No. 385.

OCTOBER TERM, 1955.

DUNN BROS., INC., *Appellant*,

vs.

A. H. STONE, CHAIRMAN, STATE TAX COMMISSION, REVIVED AS ALEX McKEIGNEY, CHAIRMAN OF STATE TAX COMMISSION,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

JURISDICTIONAL STATEMENT.

C. B. SNOW,
JUNIOR O'MARA,
900 Milner Building,
Jackson, Mississippi,
Counsel for Appellant.

ROBERT C. CANNADA,
GEORGE H. BUTLER,
900 Milner Building,
Jackson, Mississippi,
Of Counsel.

E. L. MENDENHALL, INC., 924 WYANDOTTE, KANSAS CITY, MO., HARRISON 8030

INDEX

Jurisdictional Statement 1
Opinions Delivered in the Courts Below 2
The Grounds on Which the Jurisdiction of This Court Is Invoked 2
Statutes Involved 3
Questions Presented 5
Statement of the Case 6
How the Federal Question Was Presented 11
The Questions Are Substantial 13

Appendix—

Appendix A A1
On Suggestion of Error A13
Written Ruling of Circuit Court Judge A18
Judgment A25
Appendix B, Sales Tax Law A26

Table of Citations

Annotations, 60 A. L. R. 1465; 155 A. L. R. 936 14
Annotation, 74 L. Ed. 192 14
Baltimore & O. S. W. R. Co. v. *Settle*, 260 U. S. 166, 171, 67 L. Ed. 189, 192 ..... 13, 14
Baer Bros. Mercantile Co. v. *Denver & Rio Grande R. R. Co.*, 233 U. S. 479, 490, 58 L. Ed. 1055, 1062 14
The Daniel Ball, 10 Wall. (77 U. S.) 557, 19 L. Ed. 999 14
Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S. 282, 66 L. Ed. 239 ..... 3, 16
Dunn Contract Carrier Application, 28 M. C. C. 476 20

Note: Unless otherwise indicated, all emphasis in matter quoted has been supplied.

Eureka Pipe Line Co. v. *Hallanan*, 257 U. S. 265, 66 L. Ed. 227 ..... 3, 16
Interstate Oil Pipeline Company v. *Stone*, 337 U. S. 662, 93 L. Ed. 1613 20
Memphis Steam Laundry Cleaner, Inc., v. *Stone*, 342 U. S. 389, 96 L. Ed. 436, 72 S. Ct. 424 ..... 3, 18
Michigan-Wisconsin Pipeline Co. v. *Calvert*, 347 U. S. 157, 98 L. Ed. 583, 74 S. Ct. 396 ..... 3, 18, 19
Norfolk & Western R. Co. v. *Pennsylvania*, 136 U. S. 114, 118, 119, 34 L. Ed. 394, 397 14
Railway Express Agency v. *Virginia*, 347 U. S. 359, 98 L. Ed. 757, 74 S. Ct. 558 ..... 3, 13, 18
Spector Motor Service, Inc., v. *O'Connor*, 340 U. S. 602, 95 L. Ed. 573 ..... 18, 19
United Fuel Gas Co. v. *Hallanan*, 257 U. S. 277, 66 L. Ed. 234 ..... 3, 16
U. S. v. *Erie Railroad Company*, 280 U. S. 98, 101, 102, 74 L. Ed. 187, 206 14

STATUTES

Article I, Section 8, Clause 3 of the Federal Constitution 2, 5
Chapter 3 of Title 40 of Mississippi Code of 1942, Annotated 3
Section 10105, Mississippi Code of 1942, Annotated 4, 17-18
Section 10109, Mississippi Code of 1942, Annotated 4, 6
Section 10126, Mississippi Code of 1942, Annotated 5, 18
Sections 10103-10140, Mississippi Code of 1942 5
Sections 10123 and 10124, Mississippi Code of 1942, Annotated 2, 6
28 U. S. C., Section 1257 (2) 3, 16
49 U. S. C., Sec. 20 (11) 9

IN THE

SUPREME COURT OF THE UNITED STATES

No. .....

OCTOBER TERM, 1955.

DUNN BROS., INC., *Appellant*,

vs.

A. H. STONE, CHAIRMAN, STATE TAX COMMISSION, REVIVED AS ALEX McKEIGNEY, CHAIRMAN OF STATE TAX COMMISSION,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

JURISDICTIONAL STATEMENT.

Appellant appeals from the judgment of the Supreme Court of the State of Mississippi dated the 13th day of June, 1955, reversing a judgment of the Circuit Court of the First Judicial District of Hinds County, Mississippi, and from the judgment of the Supreme Court of Mississippi dated the 15th day of July, 1955, overruling the Suggestion of Error filed by this appellant, and hereby submits this Statement to show that the Supreme Court of the United States has jurisdiction of this appeal, and that a substantial question is presented.

OPINIONS DELIVERED IN THE COURTS BELOW.

The opinions rendered by the courts below consist of the following: The opinion of the Supreme Court of the State of Mississippi rendered on the 13th day of June, 1955, reported in 80 So. 2d 802; the opinion of the Supreme Court of the State of Mississippi rendered on the 15th day of July, 1955, and not yet reported; the undated opinion of the Circuit Court of the First Judicial District of Hinds County, Mississippi, rendered during the November, 1954, term of said Court, which opinion is not reported. Copies of all of these opinions and of the judgments rendered pursuant thereto are attached hereto as Appendix A.

THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

This suit was filed by appellant pursuant to Sections 10123 and 10124 of the Mississippi Code of 1942, Annotated, which sections provide that any person improperly charged with any tax imposed by the General Sales Tax Law of the State of Mississippi, and required to pay the same, may recover the amount paid, together with interest, in any proper action or suit against the Commissioner. The basis of the suit was that, as applied to the activities of appellant, which were solely and exclusively in interstate commerce, the Mississippi Sales Tax Law violated the Commerce Clause of the Federal Constitution (Article I Section 8, Clause 3). The judgments sought to be reviewed are the judgments of the Supreme Court of the State of Mississippi dated and entered on the 13th day of June, 1955, reversing the judgment of the Circuit Court of the First Judicial District of Hinds County, Mississippi, and the judgment of the Supreme Court of the State of Mississippi

dated and entered on the 15th day of July, 1955, overruling the Suggestion of Error filed by Dunn Bros., Inc. The notice of appeal was filed in the Supreme Court of the State of Mississippi on the 9th day of August, 1955.

The statute conferring on this Court jurisdiction of this appeal is *28 U. S. C., Section 1257 (2)*.

The following decisions sustain the jurisdiction of the Supreme Court of the United States to review the judgments on direct appeal in this case:

Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S. 282, 66 L. Ed. 239; *Eureka Pipe Line Co.* v. *Hallanan*, 257 U. S. 265, 66 L. Ed. 227; *United Fuel Gas Co.* v. *Hallanan*, 257 U. S. 277, 66 L. Ed. 234; *Memphis Steam Laundry Cleaner, Inc.*, v. *Stone*, 342 U. S. 389, 96 L. Ed. 436, 72 S. Ct. 424; *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U. S. 157, 98 L. Ed. 583, 74 S. Ct. 396; *Railway Express Co.* v. *Virginia*, 347 U. S. 359, 98 L. Ed. 757, 74 S. Ct. 558.

STATUTES INVOLVED.

The validity of the General Sales Tax Law of the State of Mississippi, being *Chapter 3 of Title 40 of Mississippi Code of 1942, Annotated*, insofar as same has been applied to the operations of appellant, is involved in this appeal. The chapter is quite lengthy, and, therefore, pursuant to the Rules of this Court, the entire General Sales Tax Law of the State of Mississippi is set forth in Appendix B hereto.

The provisions of said General Sales Tax Law that are specifically involved in this appeal are as follows:

Section 10105, Mississippi Code of 1942 Annotated:

"Tax levied.—There is hereby levied and shall be collected annual privilege taxes, measured by the amount or volume of business done, against the persons, on account of the business activities, and in the amounts to be determined by the application of rates against values, or gross income, or gross proceeds of sales, as the case may be, as follows (see sections following):"

Section 10109, Mississippi Code of 1942, Annotated:

"Upon every person engaging or continuing within this state in the business of operating an express business, transporting freight or passengers from one point to another in this state, there is likewise hereby levied and shall be collected a tax, on account of the business engaged in, equal to two per cent of the gross income of the business.

* * * * * * *

"Upon every person engaging or continuing within this state in the business of operating motor vehicles on the public highways of this state for the transportation of persons or property for compensation or hire, there is likewise hereby levied and shall be collected a tax, on account of the business engaged in, equal to two percent of the gross income of the business; but such tax shall not apply to persons engaged in transporting school children under contract with counties or school districts.

"There shall be excepted from the gross income used in determining the measure of the tax imposed in this section so much thereof as is derived from the business conducted in commerce between this state and other states of the United States, or between this state and foreign countries which the state of Mississippi is prohibited from taxing under the Constitution of the United States of America. And nothing con-

tained in this section shall be construed to levy a tax upon the operation by municipal corporations of any electric, gas or water system owned by the municipality operating it."

Section 10126, Mississippi Code of 1942, Annotated:

"Is additional tax—remittances—how made.—The tax imposed by this Act shall be in addition to all other licenses and taxes levied by law as a condition precedent to engaging in any business taxable hereunder, except as in this Act otherwise specifically provides. But no municipality or levee district shall be authorized to levy any tax by virtue of the provisions of this Act."

QUESTIONS PRESENTED.

The following questions are presented by this appeal:

Is the Commerce Clause (U. S. Constitution, Article I, Section 8, Clause 3) infringed by the Mississippi Sales Tax Law (Sections 10103-10140, Mississippi Code of 1942), which, as applied to Dunn Bros., Inc., the appellant, imposes a privilege tax upon the privilege of carrying on that portion of an interstate motor carrier's business consisting of receiving certain pipe from railroads at various points in Mississippi, which had been shipped from California, and continuing the transportation of such pipe to other points in Mississippi (designated as rights-of-way)? The agreed statement of facts covering the operations involved provides "it was the intent of the shipper at all times that the pipe be transported by common carrier from the point of manufacture outside of Mississippi to the pipe line right-of-way within Mississippi," and, as a matter of fact, the pipe was so transported from California to the rights-of-way in Mississippi "by the most direct route available,"

and the agreed statement of facts further provides that "from the time the pipe left the manufacturer in California until the pipe arrived at the rights-of-way, the pipe was at all times under the care and supervision of the aforementioned common carriers, either the railroad or the plaintiff."

Are the operations of the motor carrier described above exclusively in interstate commerce?

If the operations of said motor carrier are exclusively in interstate commerce, may the State of Mississippi lawfully impose a privilege tax for the privilege of carrying on such activities?

STATEMENT OF THE CASE.

This is a suit filed by Dunn Bros., Inc., pursuant to *Sections 10123 and 10124 of the Mississippi Code of 1942, Annotated,* as amended, for the recovery of privilege taxes paid to the State of Mississippi.

Under Section 10109 of the Mississippi Code of 1942, Annotated, as amended (being a part of the General Sales Tax Law of the State of Mississippi), Dunn Bros., Inc., was charged with a privilege tax in the amount of $557.93, and was required to pay the same by the State Tax Commission of the State of Mississippi. The tax in this amount was for the period from March, 1951, the date when the operations were begun, until May 31, 1951, which was the end of the fiscal year of the taxpayer. Thereafter, Dunn Bros., Inc., filed suit in the Circuit Court of the First Judicial District of Hinds County, Mississippi, seeking a refund of this sum, plus interest. Responsive pleadings were filed by A. H. Stone, Chairman, State Tax Commission. The parties to the suit agreed to a Stipulation of

Facts, which was filed with the Circuit Court, and the case was tried on the pleadings and this Agreed Statement of Facts, without a jury. The Circuit Court rendered a written opinion to the effect that the activities of Dunn Bros., Inc., which were taxed by the State of Mississippi, were solely and exclusively in interstate commerce—that the tax levied was admittedly a privilege tax—that the State of Mississippi was prohibited by the Commerce Clause of the Federal Constitution from placing a privilege tax upon the privilege of engaging in interstate commerce, and ordered a refund of the tax paid plus interest.

The Chairman of the State Tax Commission appealed from this decision to the Supreme Court of the State of Mississippi, which rendered an opinion and judgment reversing the decision of the Circuit Court of Hinds County, Mississippi, and holding; first, that the activities of the appellant were conducted in intrastate commerce, and, second, that even if such activities were not in fact intrastate commerce, nevertheless such activities were subject to the privilege tax in question.

The facts of the case were all set forth in an Agreed Statement of Facts, which appears in the record at pages 54 through 61.

The background of this suit is essentially as hereinafter stated:

Tennessee Gas Transmission Company was the owner of a large interstate pipe line, running through several states. That company desired to put an extension to this pipe line and purchased the necessary pipe from foundries in the State of California. The said Transmission Company was then confronted with the problem of transporting the pipe from California to its right-of-way in the various states

through which the extension was to run. Due to the tremendous mileage of the haul, it was wholly impractical to transport this pipe by truck from California to its right-of-way in the states involved. The company decided, therefore, to have the pipe hauled as far as practical by rail and then complete the haul by truck. Certificated common carriers were to be used for the entire haul. Under the tariffs filed by the various carriers, it was impossible to obtain a through bill of lading from the foundry in California to the right-of-way of the company, and it, therefore, became necessary for the Tennessee Gas Transmission Company to use separate bills of lading for the railroad portion of the haul and the truck portion of the haul. Before turning this pipe over to the railroad in California, Tennessee Gas Transmission Company had made the necessary arrangements with Dunn Bros., Inc., a certificated common carrier, by motor truck, to continue the transporting of this pipe to the ultimate destination, which was the right-of-way of Tennessee Gas Transmission Company.

Dunn Bros., Inc., is a Texas corporation operating in a number of states as a common carrier by motor vehicle under certificates of convenience and necessity issued by the Interstate Commerce Commission.

The title to the pipe was in Tennessee Gas Transmission Company before it ever left California, and the company was simply attempting to get the pipe that it had acquired to its right-of-way, so that it could be then used in the construction of its pipe line extension. At the end of the railroad portion of the journey, a representative of the Tennessee Gas Transmission Company and a representative of Dunn Bros., Inc., would check the pipe while it was still on the rail cars, "for the purpose of ascertaining the condition of the pipe, and to see if the pipe had suffered any

damage in transit, or to determine whether any of the pipe had been lost in transit." (R. 59). This was done because there was no through bill of lading and, therefore, the benefits of the Carmack Amendment to the Interstate Commerce Act (49 U. S. C., Sec. 20 (11)), were not available to Tennessee Gas Transmission Company. That is to say, it could not hold the delivering carrier (Dunn Bros., Inc.) responsible for loss or damage which occurred during the railroad portion of the journey, or *vice versa*. Therefore, it needed to know which particular carrier was responsible for any damage or loss that occurred while the pipe was in transit.

Dunn Bros., Inc., would then take possession of the pipe while it was still on the railroad cars, unload the pipe from the rail cars into its trucks, and complete the transporting of the pipe to the right-of-way of Tennessee Gas Transmission, charging for its services in accordance with its tariff on file with the Interstate Commerce Commission.

It was stipulated in the Agreed Statement of Facts that "from the time the pipe left the manufacturer in California until the pipe arrived at the right-of-way, the pipe was at all times under the care and supervision of the aforementioned common carriers, either railroad or the plaintiff." (R. 59).

It was further stipulated in the agreed statement of facts as follows:

> "It was the intent and purpose of Tennessee Gas Transmission Company in originally ordering the shipment from the steel companies located outside of the State of Mississippi for all of said pipe to be transported from the point of manufacture directly to the pipe line right-of-way within the State of Mississippi, by the most direct route available. The various railheads within

> the State of Mississippi to which the pipe moved via railroads were never intended by the Tennessee Gas Transmission Company to be the ultimate destination of the pipe, but, on the contrary, it was the intent of the shipper at all times that the pipe be transported by common carriers from the point of manufacture outside of Mississippi to the pipe line right-of-way within Mississippi." (R. 58).

In performing its portion of the transportation service to be rendered, it was necessary for Dunn Bros., Inc., to haul the pipe from the end of the railroad portion of the journey to the right-of-way of Tennessee Gas Transmission Company. In some instances, the pipe was hauled by Dunn Bros., Inc., across state lines. In other instances, the pipe was hauled from the railroad to the right-of-way with both points being in the State of Mississippi. The State of Mississippi conceded that the portions of this haul where Dunn Bros., Inc., actually crossed the state line were interstate commerce and not subject to the tax demanded and collected. On the other hand, the State of Mississippi contended that as to that hauling which was done wholly within the State; that is, where the trucking carrier received the pipe from the railroad at a location within the State of Mississippi and delivered it to Tennessee Gas Transmission Company at a point on the right-of-way which was also within the State of Mississippi, such was intrastate commerce and liable for the tax collected. The State of Mississippi also contended, and the Supreme Court of Mississippi has now held, that even though these activities might be solely and exclusively in interstate commerce that, nevertheless, the State of Mississippi had the right to levy and has actually levied a tax upon the privilege of conducting these operations and that such tax does not violate the Commerce Clause of the Federal Constitution.

HOW THE FEDERAL QUESTION WAS PRESENTED.

The federal question as to the constitutionality of the application of the General Sales Tax Law of the State of Mississippi to the operations of Dunn Bros., Inc., was raised at the very outset of this matter. It was alleged in the declaration filed by Dunn Bros., Inc., in the Circuit Court of the First Judicial District of Hinds County, Mississippi. In the declaration it is alleged that the Chairman of the State Tax Commission of the State of Mississippi, erroneously assessed the plaintiff, Dunn Bros., Inc., with additional taxes; that Dunn Bros., Inc., was engaged solely and exclusively in interstate commerce in the State of Mississippi, operating under certificates granted by the Interstate Commerce Commission, and that the transportation sought to be taxed was "rendered solely in interstate commerce." (R. 7).

In its declaration Dunn Bros., Inc., then alleged as follows:

> "That under the Constitution of the United States of America, the privilege of conducting such operations is not subject to state taxation and more particularly, to the Mississippi Sales Tax Law." (R. 7).

The State of Mississippi, through the Chairman of its State Tax Commission, then filed a demurrer which was overruled, and then filed its answer putting at issue the exact constitutional question presented to this Court; that is, were these activities solely and exclusively in interstate commerce and if so, can the State of Mississippi levy a privilege tax upon the privilege of engaging in these activities?

These questions were presented orally and by brief to the Circuit Judge of the Circuit Court of the First Judicial

District of Hinds County, Mississippi, and in the opinion of that Court appears the following statement:

> "The taxes were paid under and by virtue of Section 10109, Mississippi Code of 1942, which levies sales tax upon every person engaged in business of transporting freight or passengers from one point to another in this state. Dunn Bros. claimed their business was interstate and foreign commerce and under the protection of the Commerce Clause of the Constitution they were not liable for payment of the tax, which is admittedly a privilege tax." (R. 62).

The Circuit Judge then went on in his opinion to hold that the activities were wholly in interstate commerce, and that the Commerce Clause of the Federal Constitution prohibited the State of Mississippi from levying a tax upon the privilege of engaging therein.

These same questions were raised by the Assignment of Error filed by the Chairman of the State Tax Commission, as appears in the record of this case. These exact questions were argued by brief and orally before the Supreme Court of the State of Mississippi, and the opinion of the Supreme Court of Mississippi rendered on the merits of the case deals entirely and exclusively with these constitutional questions. We again presented these questions to the Supreme Court of the State of Mississippi through the Suggestion of Error, which is also a part of the record in this case. The Supreme Court of the State of Mississippi then gave additional consideration to the constitutional question and reaffirmed its prior decision (R. 75, 93).

Thus it is clear the constitutional question was raised at the very outset of this matter and has been raised and pressed at every step of the proceedings.

THE QUESTIONS ARE SUBSTANTIAL.

This appeal presents another variation in the "seemingly endless problems raised by efforts of the several states to tax commerce as it moves among them." *Railway Express Agency* v. *Virginia*, 347 U. S. 359, 98 L. Ed. 757, 74 S. Ct. 558.

The Mississippi Supreme Court, in this case, made two definite holdings:

1. That the activities of Dunn Bros., Inc., were in intrastate commerce, and that, therefore, Dunn Bros., Inc., must pay the privilege taxes levied upon such activities;

2. That even if the activities of Dunn Bros., Inc., were solely and exclusively in interstate commerce, nevertheless, Dunn Bros., Inc., must pay the privilege tax as a recompense for the benefit and protection which the State afforded to Dunn Bros., Inc., while it was engaged in these activities.

With reference to the first holding of the Mississippi Supreme Court we point out the following:

It is well established by the decisions of this Court that "the essential character of the movement" is the decisive factor in determining whether transportation constitutes interstate or intrastate commerce. It has also been established by the decisions of this Court that the form of the bill of lading or contract of carriage is not conclusive as to the character of the transportation, but that the intent of the shipper is the predominant factor to be considered.

Baltimore & O. S. W. R. Co. v. *Settle*, 260 U. S. 166, 171, 67 L. Ed. 189, 192.

U. S. v. *Erie Railroad Company*, 280 U. S. 98, 101, 102, 74 L. Ed. 187, 206.

Annotations, 60 A. L. R. 1465; 155 A. L. R. 936.

In the case of *Baltimore & Ohio Railroad Co.* v. *Settle*, 260 U. S. 166, 171, 67 L. Ed. 189, 192, this Court stated as follows:

> "For neither through billing, uninterrupted movement, continuous possession by the carrier, nor unbroken bulk, is an essential of a through interstate shipment. These are common incidents of a through shipment; and when the intention with which a shipment was made is in issue, the presence or absence of one or all of these incidents may be important evidence bearing upon that question. *But where it is admitted that the shipment made to the ultimate destination had at all times been intended, these incidents are without legal significance as bearing on the character of the traffic.*"

It is also the law, established by decisions of this Court, that simply because a portion of the transportation involved takes place wholly within a single state and the carrier is disconnected from any other transportation system, this in itself does not make the commerce intrastate; but that where the commodity being transported is destined for or received from places outside the state, then the movement within the state is a part of the interstate movement where the "essential character of the movement" is interstate.

The Daniel Ball, 10 Wall. (77 U. S.) 557, 19 L. Ed. 999.

Norfolk & Western R. Co. v. *Pennsylvania*, 136 U. S. 114, 118, 119, 34 L. Ed. 394, 397.

Baer Bros. Mercantile Co. v. *Denver & Rio Grande R. R. Co.*, 233 U. S. 479, 490, 58 L. Ed. 1055, 1062.

Annotation, 74 L. Ed. 192.

In the present case the intent of the shipper is not in issue. The agreed Statement of Facts expressly provides that "it was the intent of the shipper at all times that the pipe be transported by common carriers from the point of manufacture outside Mississippi to the pipe line right-of-way within Mississippi" (R. 58), and that "from the time the pipe left the manufacturer in California until the pipe arrived at the right-of-way, the pipe was at all times under the care and supervision of the aforementioned common carriers, either railroad or the plaintiff." (R. 59). The "essential character of the movement" is, therefore, set forth in clear and unmistakable terms in the Agreed Statement of Facts.

The Mississippi Supreme Court, in an obvious effort to circumvent the facts as set forth in the agreement between the parties as to the "essential character of the movement," made statements concerning the facts in its original opinion which directly contradict the Agreed Statement of Facts. The effect of the decision of the Mississippi Supreme Court is to make the issuance of two bills of lading *absolutely controlling* in determining whether the transportation was interstate or intrastate, and this, in spite of the fact that this Court has held such to be "without legal significance" where the intent is clear. The intent of the parties is stipulated, and any effort by the Supreme Court of the State of Mississippi to draw inferences of other intent is taking a position directly contrary to the facts as stipulated by the parties.

The Mississippi Supreme Court apparently realized that this holding, which was in flagrant conflict with the decisions of this Court, would not stand. It undertook to bolster this obviously erroneous holding and proceeded further to hold that even though the activities taxed were

solely and exclusively in interstate commerce, nevertheless the same were subject to the privilege tax imposed.

Certainly there can be no question but that this ruling of the Mississippi Supreme Court brings this case within the jurisdiction of this Court by way of appeal.

Under the provisions of *28 U. S. C., Section 1257 (2)*, this Court has jurisdiction on appeal where there is drawn in question the validity of a state statute on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of its validity. The validity of a state statute is said to have been sustained within the meaning of this statute when the state court holds the statute applicable to a particular set of facts as against the contention that such an application is invalid on federal grounds. Thus where the court holds that a particular transaction is intrastate rather than interstate commerce, and that on such basis the state statute may be applied and enforced, the validity of the statute has been sustained as to those facts.

Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S. 282, 66 L. Ed. 239.

Eureka Pipe Line Co. v. *Hallanan*, 257 U. S. 265, 66 L. Ed. 227.

United Fuel Gas Co. v. *Hallanan*, 257 U. S. 277, 66 L. Ed. 234.

With reference to the second holding of the Mississippi Supreme Court we state as follows:

This Court has repeatedly held that a state cannot place a privilege tax directly upon operations which are exclusively and entirely in interstate commerce, and that to do so is a violation of the Commerce Clause of the Federal Constitution. The Mississippi Supreme Court paid lip-service to this fundamental principle when it stated in its original opinion as follows:

> "The federal courts have repeatedly held that state taxes cannot be collected upon the privilege of carrying on a business that is exclusively interstate in character." (R. 78).

Yet, the Mississippi Supreme Court in the same opinion holds that unless the record shows that the interstate operator has actually paid other taxes to the state, then the state can levy and collect a privilege tax upon the privilege of carrying on an interstate business. In other words, the Supreme Court of Mississippi recognizes the rule and then proceeds to ignore it. The effect of this holding is that the Commerce Clause of the Federal Constitution does not mean what it says, *unless* the record shows that the interstate carrier pays other and additional taxes to the state involved.

It was thought that the Mississippi Supreme Court could not possibly be intentionally making such a decision, and, accordingly, a Suggestion of Error was filed with that court pointing out this obvious and flagrant disregard of the Federal Constitution and the many decisions of this Court. The Suggestion of Error was considered and the Mississippi Supreme Court reiterated and reaffirmed its holding in this regard. The intent of that court is clear. The holding is simply that the Commerce Clause of the Federal Constitution does not prohibit the imposition of a privilege tax on interstate commerce where no showing is made that the interstate carrier has paid other taxes to the State of Mississippi.

There is no question but that the tax here involved is a privilege tax levied directly upon an interstate carrier for the privilege of conducting its operations. The statute imposing the tax is clear and positive. It provides "there is hereby levied and shall be collected annual privilege taxes * * * on account of the business activities * * *."

Section 10105, Mississippi Code of 1942, Annotated. The statute then goes on to provide "the tax imposed by this Act shall be in addition to all other licenses and taxes levied by law as a condition precedent to engaging in any business taxable hereunder * * *." *Section 10126, Mississippi Code of 1942, Annotated.*

This decision of the Mississippi Supreme Court is in direct and flagrant violation of the decisions handed down by this Court in the cases of *Spector Motor Service, Inc.*, v. *O'Connor*, 340 U. S. 602, 95 L. Ed. 573; *Memphis Steam Laundry Cleaner, Inc.*, v. *Stone*, 342 U. S. 389, 96 L. Ed. 436, 72 S. Ct. 424; *Michigan-Wisconsin Pipeline Co.* v. *Calvert*, 347 U. S. 157, 98 L. Ed. 583, 74 S. Ct. 396; *Railway Express Agency* v. *Virginia*, 347 U. S. 359, 98 L. Ed. 757, 74 S. Ct. 558, and many other decisions that could be cited.

In addition, if this opinion is left standing, it will mean that the state courts have found a way to circumvent and to make almost meaningless the Commerce Clause of the Federal Constitution. If this opinion is left standing, then privilege taxes can be imposed directly upon the privilege of engaging in interstate commerce by the various states, unless it is shown that the states are paid other taxes. Many questions then present themselves. Who is to determine what other taxes are to be paid? Who is to determine how much other taxes are to be paid?

The effect of such a ruling upon the economy of this nation is apparent. A new principle of constitutional law will have been established, to-wit, that the privilege of engaging in interstate commerce may be taxed by a state. We do not feel that further elaboration as to the importance of this principle is necessary or would be proper.

The only reason given by the Mississippi Supreme Court to support its holding is that the record does not

show that Dunn Bros., Inc., paid taxes to the State of Mississippi for the benefits and protection that Dunn Bros., Inc., received while it was operating in interstate commerce in the State of Mississippi. This does not justify the imposition of a privilege tax directly upon the privilege of engaging in interstate commerce. Benefits and protection afforded by a state to an interstate carrier are relevant only to show that the essential requirements of due process have been met sufficiently to justify the imposition of *any* tax on the interstate activity. These facts are not material in determining the validity of a specific privilege tax under the Commerce Clause. This has been clearly and unmistakably held by this Court in the case of *Michigan-Wisconsin Pipeline Co.* v. *Calvert*, 347 U. S. 157, 163, 164, 98 L. Ed. 583, 590. The requirement of due process is one question; the question of conflict with the Commerce Clause of the Federal Constitution is an entirely different question.

There is no magic in the phrase relied upon by the Mississippi Supreme Court to the effect that interstate commerce must be made to pay its way. As pointed out by this Court in the *Spector case*, 340 U. S. 602, 608, 95 L. Ed. 573, 578, "the question whether a state may validly make interstate commerce pay its way depends *first of all upon the constitutional channel through which it attempts to do so.*" A privilege tax placed directly upon activities which are exclusively in interstate commerce is an unconstitutional channel. The mere fact that the same number of dollars might have been exacted in a constitutional way, cannot legalize a direct privilege tax on interstate commerce.

There are many other reasons why this case is of extreme importance. We realize that the amount of money involved is not of paramount concern to this Court; how-

ever, there is a very large amount of money involved. The tax involved in this case covers only a short period of time, but if this decision of the Mississippi Supreme Court is upheld, then Dunn Bros., Inc., and all of the other carriers will be called upon immediately for vast amounts of privilege taxes for other periods of time.

Still another reason why this case is of importance is the fact that the Mississippi Supreme Court apparently placed considerable reliance upon the undecisive case of *Interstate Oil Pipeline Company* v. *Stone*, 337 U. S. 662, 93 L. Ed. 1613. This Court has held in several recent cases that the decision rendered in the Interstate Oil Pipeline Company case did not authorize the imposition of a privilege tax directly upon interstate commerce. However, there is apparently still confusion in the minds of the members of the Mississippi Supreme Court concerning the holding in that case as to what constitutes interstate commerce. It is submitted, therefore, that the present case illustrates the need for clarification and explanation of the Interstate Pipeline Company case insofar as it discusses the question of interstate commerce as distinguished from intrastate commerce.

Another reason why such significance is being attached to this decision of the Mississippi Supreme Court is that it will place interstate carriers in an impossible position. The Interstate Commerce Commission has held with reference to the identical situation involved in this case, with the identical carrier being involved, that operations of the type here involved are in interstate commerce, and that a Certificate of Public Convenience and Necessity from the Interstate Commerce Commission must be held before this transportation service can be rendered. *Dunn Contract Carrier Application*, 28 M. C. C. 476. On the other hand, the Mississippi Supreme Court has now

held that these activities are in intrastate commerce. Is it necessary for Dunn Bros., Inc., and all other such carriers in this nation now to begin making applications to each of the forty-eight states for intrastate authority to perform this transportation service? The entire industry is vitally affected by this holding of the Mississippi Supreme Court, and it is vitally important that this Court establish the applicable rules under which carriers can operate.

It is submitted that, for all of the foregoing reasons, the questions are of public importance and so substantial as to require plenary consideration with briefs on the merits and oral argument.

Respectfully submitted,

C. B. SNOW,
JUNIOR O'MARA,
900 Milner Building,
Jackson, Mississippi,
Counsel for Plaintiff-Appellant.

ROBERT C. CANNADA,
GEORGE H. BUTLER,
900 Milner Building,
Jackson, Mississippi,
Of Counsel.